BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WESLEY G. PAPPAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,021,841
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent appeals the February 20, 2007 Award of Administrative Law Judge John D. Clark. Claimant was found to be permanently and totally disabled as the result of injuries suffered on July 26, 2001.

Claimant appeared by his attorney, John L. Carmichael of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John C. Nodgaard of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). The Board heard oral argument on May 18, 2007. The parties acknowledged at oral argument to the Board that the compensation rate of $434.04 utilized by the ALJ in the Award was improper for an accident date in July 2001. The maximum rate for an accident occurring between July 1, 2001, and June 30, 2002, would be $417. The maximum rate for an accident occurring between July 1, 2002, and June 30, 2003, would be $432. The error will be corrected in the final computation of this award.

ISSUES

1. Did claimant suffer accidental injuries arising out of and in the course of his employment after July 26, 2001? Respondent stipulated that

claimant suffered accidental injury on July 26, 2001, but denies that claimant suffered additional injuries each and every day through his last day worked on December 4, 2002.[1]

2. What is the nature and extent of claimant's injuries and resulting disability? Respondent contends that claimant has put forth no effort to obtain employment after his termination from respondent. Therefore, a wage should be imputed, pursuant to K.S.A. 44-510e. Respondent acknowledges that claimant will qualify for the $100,000 permanent partial disability maximum under K.S.A. 44-510f, but argues that claimant is not permanently and totally disabled. Claimant argues he has proven his entitlement to an award for permanent total disability and requests the award be affirmed.

3. Did claimant submit timely written claim pursuant to K.S.A. 44-520a? Respondent argues that claimant suffered an accident on July 26, 2001, when a tire he was loading fell, dragging claimant into a ditch. Claimant had an Employer's Report of Accident filled out by his supervisor, as claimant was unable to write due to the injury. Respondent argues the E-1 (Application For Hearing) form cannot be used as written claim pursuant to K.S.A. 44-557. Claimant argues the use of the form is proper here as that was the only form made available by respondent to be used after an accident. Claimant also argues he suffered additional injuries through his last day worked on December 2, 2002,[2] and the written claim submitted on February 9, 2005, is within 200 days after the last date of the payment of compensation by respondent, pursuant to K.S.A. 44-520a.[3]

FINDINGS OF FACT

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to find that claimant suffered additional accidental

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[1] The Amended E-1 (Application for Hearing), which was filed April 29, 2005, listed claimant's date of accident as through December 4, 2002. However, claimant testified that his last day worked was December 2, 2002. (See R.H. Trans. at 14.)

[2] *Id*.

[3] Pursuant to the stipulation of the parties, temporary total disability was paid for 116.43 weeks between August 29, 2002, and January 1, 2005. (See R.H. Trans. at 8.)

injuries through his last day worked and to correct the compensation rate, but, in all other regards, affirmed.

Claimant was employed as an equipment operator for respondent on July 26, 2001, when a tire he was lifting slipped out of a truck, dragging claimant into a ditch. Claimant suffered injuries to his right arm. Claimant's pain was so great that, when he reported the injury to his supervisor, James M. (Matt) Groene, claimant was unable to complete an accident report, instead asking Mr. Groene to complete the form for him. Claimant was provided no other form to fill out after the accident. Mr. Groene stated that respondent had a policy or procedure that required the supervisor and employee fill out the accident report. The report was then kept on file in case "they don't go to the doctor right then, if something comes back later".[4] Claimant sought no medical treatment after this accident.

Claimant continued performing his regular duties for respondent until May or June 2002, when he was transferred to a job building a pole barn. While building the barn, claimant would swing a heavy hammer with his right hand while holding onto the pole with his left hand. Claimant would occasionally switch hands using his left hand to swing the hammer. While performing this job, claimant began having problems with his right arm, shoulder and neck. Claimant reported the problems to Mr. Groene and requested medical treatment. Claimant first went to his personal doctor, Bryan K. Dennett, M.D., on June 18, 2002, complaining of right shoulder pain. Dr. Dennett x-rayed claimant's shoulder, diagnosing some separation between the acromion and the clavicular joint in the shoulder, with possible biceps disruption. Dr. Dennett recommended claimant see an orthopedist, but would not make the referral, advising that claimant's injuries were work related and claimant needed to talk to his employer about a workers compensation referral. Dr. Dennett was advised only of claimant's injuries suffered in July 2001.

Claimant was referred by respondent to board certified orthopedic surgeon George L. Lucas, M.D., for an examination on July 24, 2002. Claimant advised Dr. Lucas of the tire-lifting incident only. Claimant did tell Dr. Lucas that his right arm, shoulder and elbow continued to hurt, and he was overcompensating with the left arm and was beginning to develop soreness in the left arm as well. Claimant returned to Dr. Lucas on August 28, 2002, for a steroid injection in the acromioclavicular joint. Claimant was then referred by Dr. Lucas to board certified orthopedic surgeon John D. Osland, M.D., with the first examination on October 9, 2002. Claimant only informed Dr. Osland of the July 26, 2001 accident.

An MRI arthrogram of the shoulder revealed a labral tear to the superior and anterior aspect of the shoulder. Surgery was performed on December 4, 2002, to repair the tear

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[4] Groene Depo. at 10.

and an arthroscopic subacromial decompression was performed. The shoulder improved after the surgery, but then claimant began to experience more problems, including numbness in his elbow. Tests to claimant's neck performed on March 7, 2003, indicated symptoms into claimant's shoulder or down his arm. These problems were not present at the time of the October 9, 2002 examination. Dr. Osland suspected that there must be something going on in claimant's cervical spine. An MRI of the cervical spine on March 11, 2003, revealed narrowing of the spinal canal, a posterior central disc protrusion at C5-6 and a mild posterior bulging disc at C6-7.

On October 10, 2003, claimant underwent a transposition surgery on the ulnar nerve in his right elbow. Dr. Osland rated claimant with a 21.5 percent permanent partial impairment to the right shoulder, pursuant to the fourth edition of the AMA *Guides*.[5] (This would convert to a 13 percent whole body impairment.) Dr. Osland testified claimant's problems were probably a natural and probable consequence or progression of the original 2001 injury.

Claimant was ultimately referred to orthopedic surgeon Charles D. Pence, M.D., of the Wichita Clinic, P.A., for treatment of his neck complaints. Claimant underwent a laminoplasty at C6-7 plus anterior fusion at C5 through C7. In his note of December 30, 2004, Dr. Pence rated claimant at 31 percent to the whole body, which, Dr. Pence opined, when combined with Dr. Osland's 13 percent whole body rating for the shoulder, resulted in a total 40 percent permanent whole body impairment.[6] Dr. Pence also noted claimant's inability to return to being a heavy equipment operator.[7]

Claimant was examined by board certified physical medicine specialist Philip R. Mills, M.D., at the request of claimant's attorney on March 2, 2005. Dr. Mills diagnosed claimant's many and ongoing difficulties stemming from his numerous surgeries. He did not provide an impairment rating for claimant, finding instead that claimant was realistically unemployable because he had performed manual labor his entire working life, and could no longer do so. Claimant was restricted to a 10-pound lifting limit, with primarily a sit-down job only and a need to rest on an as-needed basis. Dr. Mills did not believe claimant would realistically be "in the competitive labor market".[8]

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[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[6] Stipulation (filed Oct. 2, 2006), (Dr. Pence's Dec. 30, 2004 report at 1).

[7] Stipulation (filed Oct. 2, 2006), (Dr. Pence's Oct. 6, 2004 report at 1).

[8] Mills Depo. at 25.

Claimant was referred by respondent to board certified neurosurgeon Paul S. Stein, M.D., for an examination on May 13, 2005. Dr. Stein was apprised of claimant's two surgeries on his right shoulder, the surgery to claimant's right elbow and two surgeries to his neck. Dr. Stein rated claimant at 42 percent to the body as a whole pursuant to the fourth edition of the AMA *Guides*.[9] Dr. Stein restricted claimant from doing any heavy work with the right hand above the shoulder level, from overhead work or activity requiring bending or twisting of the neck and from lifting above 15 pounds with the right hand, and claimant would have to alternate standing, sitting and walking. Claimant could no longer operate heavy equipment or do heavy activities such as shoveling or digging. Dr. Stein rated claimant at 42 percent to the whole person pursuant to the fourth edition of the AMA *Guides*.[10] Of the 31 non-duplicative tasks contained on the list prepared by vocational specialist Karen Terrill, claimant was unable to perform 22 for a 71 percent loss of task performing abilities. Of the 44 tasks listed by vocational specialist Jerry Hardin, Dr. Stein determined that claimant was unable to perform 29, for a 66 percent task loss. Dr. Stein agreed the activities associated with building a pole barn would aggravate or worsen claimant's original injury.

Claimant was evaluated by board certified physical medicine and rehabilitation specialist George G. Fluter, M.D., at the request of claimant's attorney. Dr. Fluter examined claimant on July 5, 2005. He rated claimant at 48 percent impairment to the whole body for the numerous injuries suffered while working for respondent. Dr. Fluter found claimant to be essentially and realistically unemployable due to the injuries suffered with respondent. Dr. Fluter noted claimant had spent his entire life performing very physically demanding jobs. Claimant could no longer perform that type of work. Dr. Fluter expressed concern that claimant, even if he tried sedentary work, would find it difficult to perform that type of work on a regular 40-hour-per-week basis. He testified there would be days that claimant would not be able to perform any work due to his chronic pain.

Claimant was referred to psychiatrist Achutha N. Reddy, M.D., on July 25, 2005, by claimant's attorney. He was later evaluated by licensed psychologist T. A. Moeller, Ph.D., for a court ordered psychological evaluation on November 22, 2005. Claimant was diagnosed with major depression, pain disorder, adjustment disorder and preexisting posttraumatic stress disorder, all of which were determined to be related to, caused by or exacerbated by claimant's work-related injuries. Claimant's childhood contributed to his ongoing psychological problems. The son of an alcoholic and abusive father and an alcoholic mother, claimant witnessed his mother shooting and killing his father. Claimant's own alcohol problems were lifelong, although, at the time of the evaluation by Dr. Moeller,

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[9] AMA *Guides* (4th ed.).

[10] AMA *Guides* (4th ed.).

claimant had been sober for 14 years. Dr. Moeller found claimant's early life caused him to experience a heightened risk of exaggerated negative reactions to stress, including physical injury stress. This was seen as a predisposition to chronic pain. Dr. Moeller stressed that this was not malingering on claimant's part. This is not a conscious reaction on claimant's part, but rather a subconscious psychological reaction to pain.

Carol Wilken, a program consultant for the State Self Insurance Fund, first became aware of claimant's on-the-job injuries on June 10, 2002. At some point, Ms. Wilken contacted claimant and interviewed him over the phone. In that conversation, claimant advised her of the accident which occurred on July 26, 2001. Claimant also discussed his increased problems resulting from the work on the pole barn. Claimant detailed the hammering activities which led to cramping and pain, including burning in his elbow, biceps and shoulder. Even after being told of the recent problems while building the pole barn, Ms. Wilken authorized treatment relative to the July 26, 2001 accident only. Additionally, Ms. Wilken did not complete an Employer's Report of Accident for the more recent accident. Ms. Wilken noted that claimant completed a written claim for the more recent injuries dated August 22, 2002. Claimant was paid temporary total disability compensation for 116.43 weeks between August 29, 2002, and January 1, 2005.

Claimant was evaluated by two vocational specialists, Karen Terrill and Jerry Hardin. Both determined claimant would be limited to sedentary work, with Mr. Hardin determining claimant would have to be able to rest on an as-needed basis pursuant to the restrictions of Dr. Mills. While claimant made some attempt to obtain employment, his efforts were very limited. By the time of the regular hearing, claimant was receiving approximately $1,100.00 from Social Security disability and approximately $400.00 from KPERS disability, for a total of about $1,553.00 per month.

During his deposition on July 13, 2006, claimant testified that he has good days and bad days. On a bad day, he cannot sit, stand or walk. He also has a great deal of pain. Claimant testified that he has more bad days than good. Claimant last worked in December 2002.

In May 2006, claimant was served with separation papers by his wife. This necessitated he move from their house. He relocated to Kaw City, Oklahoma, to a house owned by his mother and stepfather. He has to remain in Kay County in order to qualify for medical insurance benefits through the Kaw Nation.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[11]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[12]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[13]

K.S.A. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[14]

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[15]

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[11] K.S.A. 44-501 and K.S.A. 44-508(g).

[12] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[13] K.S.A. 44-501(a).

[14] K.S.A. 44-508(d).

[15] K.S.A. 44-508(e).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[16]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[17]

When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[18]

However, the Kansas Supreme Court, in *Stockman,*[19] stated:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

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[16] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[17] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[18] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[19] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); *see also Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

When dealing with a series of injuries which occur microscopically over a period of time, the Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation for injuries occurring before July 1, 2005. The date of injury for repetitive injuries in Kansas has been determined to be either the last day worked or the last day before the claimant's job is substantially changed.[20]

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[21]

ANALYSIS

Claimant suffered an accidental injury on July 26, 2001, for which he neither requested nor received medical treatment. Claimant continued to perform his regular duties for respondent after the accident. An accident report was completed by claimant, with claimant's supervisor filling out the report, as claimant was unable to write due to the injury. It is obvious this is the only form made available by respondent to serve as a claim after an accident. It is also obvious respondent intended the form to be more than a reporting form for the State. As noted by Mr. Groene, claimant's supervisor, the form was in case a worker did not go to the doctor "right then, if something comes back later."[22] Mr. Groene acknowledged the State provided no other forms for reporting accidents. Respondent obviously intended this Employer's Report of Accident to serve more than one purpose. Under these circumstances, the Board finds the completion of the accident report by claimant's supervisor satisfies the requirements of K.S.A. 44-520a.

The fact claimant received no medical treatment from that accident, and continued to perform his regular duties for almost a year, convinces the Board claimant suffered no permanent disability from that accident.

An accident, as defined by K.S.A. 44-508(d), does not need to be a single traumatic event. Kansas has long recognized microtraumas as accidents compensable under the Workers Compensation Act. Claimant's activities in the spring and summer of 2002, while building the pole barn for respondent, constitute trauma sufficient to be an accident under

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[20] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

[21] K.S.A. 44-510c(a)(2).

[22] Groene Depo. at 10.

the law as it exists in Kansas. Claimant's testimony regarding the development of pain while hammering and holding onto the poles is uncontradicted. The fact that claimant did not report these activities to the health care providers is troubling to the Board. But not as troubling as the fact Ms. Wilken, when told by claimant of the problems stemming from the work on the pole barn, still only authorized treatment for the 2001 accident. Additionally, even though she was regularly involved in workers compensation activities as a workers compensation adjuster, Ms. Wilken neglected to fill out an accident report for that series of accidents. Additionally, the health care providers, while only being told of the incident in 2001, nevertheless provided treatment for the shoulder and neck problems which appear to have developed from the work on the pole barn. The Board finds claimant suffered additional accidental injuries arising out of and in the course of his employment while working on respondent's pole barn.

The date of accident for this series of accidents is not clear. The accident was reported to Ms. Wilken on June 10, 2002. Claimant first sought treatment for these injuries with Dr. Dennett on June 18, 2002. The stipulation of the parties indicates claimant began receiving temporary total disability on August 29, 2002, and continued receiving same until January 1, 2005. But the parties also agree claimant worked through December 2, 2002. The Board finds, pursuant to *Treaster*, that claimant suffered a series of accidents through June 10, 2002, the first day claimant sought medical treatment for his problems, because it is not clear from this record whether claimant continued to perform the offending activities after that date. The written claim submitted by claimant on August 22, 2002, would easily satisfy the requirements of K.S.A. 44-520a for an accident or series of accidents ending in June 2002.

The ALJ, after considering the functional impairment ratings of the various health care providers, found claimant had suffered a 45 percent functional impairment to the whole body. The Board agrees and affirms that finding.

The ALJ also found claimant to be permanently and totally disabled. The Board also agrees with this conclusion. Claimant spent his entire working career performing heavy manual labor. His significant injuries resulted in his no longer being able to perform that heavy work. The vocational experts found claimant able to perform sedentary work, but failed to consider the requirements that claimant be able to sit, stand and walk as needed. Also, Dr. Fluter expressed a concern that claimant would need to lie down whenever he needed to. Realistically, claimant could not find work in the open labor market that would accommodate all of these restrictions.

CONCLUSIONS

Claimant suffered an accidental injury on July 26, 2001, from which he suffered no permanent disability. Claimant provided timely written claim for that accident. Claimant also suffered additional accidental injuries while building respondent's pole barn in June 2002. Claimant also submitted timely written claim for that accident. From that June 2002 series of accidents, claimant suffered a 45 percent permanent partial disability to the whole body on a functional basis, and is permanently and totally disabled.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated February 20, 2007, should be, and is hereby, modified with regard to the proper rate of compensation and the final date of accident, but affirmed in all other regards.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Wesley G. Pappan, and against the respondent, State of Kansas, and its insurance carrier, State Self Insurance Fund, for an accidental injury which occurred through June 10, 2002, and based upon an average weekly wage of $651.02.

Claimant is entitled to 116.43 weeks of temporary total disability compensation at the rate of $417 per week totaling $48,551.31, followed by permanent total disability compensation at the rate of $417 per week not to exceed $125,000 for a permanent total general body disability.

As of July 27, 2007, there would be due and owing to the claimant 116.43 weeks of temporary total disability compensation at the rate of $417 per week in the sum of $48,551.31, plus 151.14 weeks of permanent total disability compensation at the rate of $417 per week in the sum of $63,025.38, for a total due and owing of $111,576.69, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $13,423.31 shall be paid at $417 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of August, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
John C. Nodgaard, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge